

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3 In the Matter of )

4 )  
5 John McCain 2008, Inc. and )

6 Joseph Schmuckler in his official capacity )  
7 as treasurer )

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COMMISSION

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9 **SECOND GENERAL COUNSEL'S REPORT**

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11 **I. ACTIONS RECOMMENDED**

12 (1) Find reason to believe that John McCain 2008, Inc. and Joseph Schmuckler in  
13 his official capacity as treasurer ("McCain 2008" or "the Committee") violated 2 U.S.C.  
14 § 434(b) by failing to report correctly the dates of receipt for contributions it received  
15 through joint fundraising representatives and failing to itemize primary contributions  
16 redesignated to the McCain-Palin Compliance Fund, Inc. ("GELAC"); and (2) authorize  
17 pre-probable cause conciliation with McCain 2008 for accepting excessive contributions  
18 in violation of 2 U.S.C. § 441a(f) and failing to report correctly joint fundraising receipts  
19 and contributions redesignated to GELAC in violation of 2 U.S.C. § 434(b);

20  
21 **II. INTRODUCTION**

22 In August 2010, the Federal Election Commission ("FEC" or "Commission")  
23 found reason to believe that McCain 2008 violated the Federal Election Campaign Act of  
24 1971, as amended, (the "Act") by accepting an unknown number of excessive  
25 contributions in violation of 2 U.S.C. § 441a(f) during the 2008 primary election period.  
26 See Commission Certification at ¶ 1 (Aug. 30, 2010).<sup>1</sup> Relying on information compiled

<sup>1</sup> The Commission also found no reason to believe that McCain 2008 violated § 434(b) by failing to disclose a \$56,047 contribution by Brian Medeska or violated 2 U.S.C. § 432(c) by failing to properly account for the receipt of anonymous contributions and maintain identifying information for other contributors.

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1 by the Reports Analysis Division ("RAD"), the Commission found that McCain 2008  
2 may have accepted between \$3.5 and \$5.7 million in excessive contributions. Factual &  
3 Legal Analysis (Sept. 13, 2010) ("F&LA"). The Commission also found that McCain  
4 2008 may have misreported the original date of receipt for certain primary election  
5 contributions made through its various joint fundraising representatives resulting in those  
6 contributions appearing to have been "primary-after-primary" excessive contributions  
7 (i.e., primary contributions made after the date of the primary election).<sup>2</sup> F&LA at 4, n.2.  
8 Further, the Commission found that the Committee may have misreported additional  
9 primary contributions redesignated to the GELAC, which was established pursuant to  
10 11 C.F.R. § 9003.3(a)(1). *Id.* The Commission authorized an investigation and a  
11 Section 437g audit to determine the extent of McCain 2008's violations. *See*  
12 Commission Certification at ¶ 2 (Aug. 30, 2010).

13 In response to the Commission's reason to believe ("RTB") findings, McCain  
14 2008 asserted that a "significant number" of the "outstanding excessive" contributions  
15 identified by the Commission were resolved through timely refunds, redesignations, and  
16 reattributions. *See* RTB Resp. at 1. McCain 2008 also claimed that a portion of these  
17 allegedly outstanding excessive contributions were actually made in permissible amounts  
18 but may have been erroneously listed as excessive by aggregating contributions for  
19 multiple donors who share the same name. *Id.* The Committee noted that certain other  
20 contributions identified by the Commission as excessive were uncashed refund checks  
21 that were eventually voided and appropriately disbursed to public charities or the United

<sup>2</sup> These joint fundraising committees were established pursuant to 11 C.F.R. § 102.6. Participants included McCain 2008, GELAC, the Republican National Committee, and various state party committees.

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1 States Treasury. *Id.* at 2. McCain 2008 also stated that the campaign made memo entries  
2 and retained proof of contribution dates in the form of postmarks and other documents for  
3 all alleged primary-after-primary contributions made within the permissible time frame.  
4 Further, the Committee contended that any such contributions received after the  
5 permissible time frame were appropriately refunded or redesignated to the GELAC. *Id.*

6 The Committee acknowledged that, although in some instances excessive  
7 contributions were properly remedied by refund, redesignation or reattribution, the  
8 remedial actions were not reported in a timely manner. *Id.* McCain 2008 also admitted  
9 that certain outstanding excessive contributions were remedied after the prescribed 60-  
10 day period and stated there existed a *de minimis* amount (\$16,967) of unresolved  
11 outstanding excessive contributions, which it attributed to "inadvertent and inevitable  
12 processing errors," including "unmerged duplicate records" and a delay in receiving a  
13 partnership attribution. *Id.*

14 During the subsequent Section 437g audit, the Commission's Audit Division  
15 identified unresolved excessive contributions discovered during its review of McCain  
16 2008's disclosure reports, bank records and accounting databases, and provided the  
17 Committee with a list of these errors. On April 18, 2012, the Audit Division provided  
18 the results of the Section 437g audit to the Office of General Counsel ("OGC"). *See*  
19 Memorandum to the OGC from the Audit Division, Attach. 1 (Apr. 18, 2012). In  
20 summary, the Audit Division made the following findings:

- 21 • McCain 2008 accepted \$377,657 in excessive contributions that were not  
22 resolved through refund, redesignation, or reattribution within the 60-day  
23 window under 11 C.F.R. § 110.1(b)(3)(i). (Of this amount, \$322,132 remains  
24 within the statute of limitations.);

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- To resolve the excessive contributions, McCain 2008 (i) refunded \$290,245 and redesignated or reattributed \$11,650 prior to the Committee's receiving notice of the Commission's investigation; (ii) refunded \$75,762 (between October 2011 and January 2012) after receiving the Commission's RTB notification; and
- A projection (based on a sample) of primary redesignations to GELAC indicated that McCain 2008 failed to complete memo entries for approximately \$1.9 million in contributions.

Additionally, the Audit Division's review of the disclosure reports filed by McCain 2008 and the joint fundraising representatives determined that McCain 2008 misreported the original date of receipt for over \$22 million in contributions that were transferred from joint fundraising committees by disclosing the transfer date but not the date on which the transferred funds were received by the joint fundraising representatives. *See* Audit Memorandum to Marianne Abely (Sept. 27, 2012) ("Audit Memorandum (Sept. 27, 2012)"). This review also revealed that a portion of these contributions (\$2,356,473.17) erroneously appeared to be excessive primary after primary contributions. *See Id.*; Attach. 1.

As noted above, McCain 2008 took corrective action by refunding approximately \$75,762 in previously unresolved excessive contributions (the Committee had resolved approximately \$301,895 in other excessive contributions prior to the RTB Commission's findings).

McCain 2008 was given the opportunity to respond to the Audit Division's findings. *See* Notification Letter from OGC to Matthew T. Sanderson, Esq., Counsel to Committee (May 24, 2012). In response to the Section 437g findings, McCain 2008 stated that delays in resolving the "untimely resolved" contributions identified in the audit were due in large part to the merging of duplicate records. *See* Resp. to Notification

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1 at 1 (June 7, 2012) ("Resp. to Notif."). According to the Committee, it attempted to  
2 match new contribution data with existing records through manual reviews and software  
3 algorithms but it was unable to do so with perfect accuracy. *Id.* McCain 2008 further  
4 stated that regardless of the cause of the untimely resolution, the campaign acted  
5 immediately to properly resolve each excessive contribution after learning of its untimely  
6 status. *Id.* The Committee also argued that it properly reported the primary-after-  
7 primary joint fundraising contributions when it reported the date these contributions were  
8 deposited by McCain 2008. *Id.* at 2.

9 Based on the results of the investigation and Section 437g audit, we recommend  
10 that the Commission make an additional RTB finding that McCain 2008 violated  
11 2 U.S.C. § 434(b) when it misreported the original date of receipt for contributions  
12 received from its joint fundraising representatives and failed to complete memo entries  
13 for primary redesignations from McCain 2008 to GELAC; and enter into conciliation  
14 with McCain 2008 prior to a finding of probable cause to believe that McCain 2008  
15 violated the Act by accepting excessive contributions, misreporting the original date of  
16 receipt for contributions received through joint fundraising representatives and failing to  
17 itemize primary contributions redesignated to GELAC;

18  
19 **III. ANALYSIS**

20 The investigation and Section 437g audit revealed that McCain 2008 received  
21 excessive contributions totaling \$377,657 in violation of 2 U.S.C. § 441a(f) and failed to  
22 correctly report the original dates on which \$22,257,684.17 in contributions were  
23 received by the Committee's joint fundraising representatives. A projection based on a

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1 sample also revealed that McCain 2008 failed to complete memo entries for \$1,989,693  
2 in transfers from McCain 2008 to GELAC in violation of 2 U.S.C. § 434(b).

3 **A. Receipt of Excessive Contributions**

4 During the 2008 election cycle, the Act instructed that no person was permitted to  
5 make contributions to a candidate for federal office or his authorized political committee,  
6 which in the aggregate exceeded \$2,300 each for the primary and general elections.

7 2 U.S.C. § 441a(a)(1)(A). As a corollary, it was unlawful for candidates for federal  
8 office or the candidate's authorized political committee to knowingly accept  
9 contributions that in the aggregate exceeded \$2,300 each for the primary and general  
10 elections. 2 U.S.C. § 441a(f). Where a political committee has received an excessive  
11 contribution, the Commission's regulations provide the committee 60 days from the date  
12 of receipt to identify and refund, redesignate, or reattribute the excessive amount.  
13 11 C.F.R. § 110.1(b).

14 The audit revealed that, during the primary election period, McCain 2008  
15 accepted a total of \$377,657 in contributions that exceeded the limits set forth in 2 U.S.C.  
16 § 441a(a)(1)(A), but were not resolved within 60 days. See Attach. 1 at 3. According to  
17 the audit, McCain 2008 refunded, redesignated, or reattributed \$301,895 in excessive  
18 contributions received prior to its receipt of the Commission's RTB finding, though it did  
19 so outside of the 60-day time period permitted by the Act for resolving potential  
20 excessive contribution violations. *Id.*; see 11 C.F.R. §§ 103.3(b)(3), 110.1(b)(3)(i). This  
21 amount included untimely refunds of \$290,245 (including \$11,900 in contributions with  
22 multiple donor IDs), redesignations of \$7,350 and reattributions totaling \$4,300. See  
23 Attach. 1 at 3.

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1 After receiving notice of the Commission's RTB finding, the Committee refunded  
2 an additional \$73,030 in excessive contributions. *Id.* McCain 2008 also refunded \$2,732  
3 after the Audit Division's supplemental review of the Committee's internal records to  
4 identify donors with multiple IDs. *Id.*

5 In sum, the audit determined that McCain 2008 refunded, redesignated, or  
6 reattributed excessive contributions totaling \$377,657 outside of the time permitted by  
7 the regulations to resolve such violations. *See infra* Chart A.

8 *Chart A. - Audit Results*

Untimely Refunded/Redesignated/Reattributed Excessive Contributions	
Refunded Pre RTB	\$278,345
Redesignated Pre RTB	\$7,350
Reattributed Pre RTB	\$4,300
Refunded Post RTB – RAD List	\$73,030
Refunded Pre RTB – Multiple Donor ID Review	\$11,900
Refunded Post RTB – Multiple Donor ID Review	\$2,732
<b>Total:</b>	<b>\$377,657</b>

9  
10 **B. Reporting Violations**

11 **1. Misreporting of Joint Fundraising Transfers**

12 The Act requires all political committees to publicly report all of their receipts  
13 and disbursements. *See* 2 U.S.C. § 434. Each report shall disclose for the reporting  
14 period and calendar year the total amount of all receipts and the total amount of all  
15 disbursements. *See* 2 U.S.C. § 434(b)(2), (4), 11 C.F.R. § 104.3(a), (b). The Act requires  
16 that an authorized committee of a candidate report the amount of all receipts from  
17 transfers by affiliated committees, as well as the identity of the affiliated committee and  
18 date(s) of transfer. *See* 2 U.S.C. § 434(b)(2)(F), (3)(D); 11 C.F.R. § 102.17(c)(3)(iii),  
19 (c)(8)(i)(B); *see also* 11 C.F.R. §§ 104.3(a)(4), 104.8.

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1 Commission regulations permit political committees to engage in joint  
2 fundraising with other political committees or with unregistered committees or  
3 organizations. *See* 11 C.F.R. § 102.17. After a joint fundraising representative  
4 distributes the net proceeds, a participating political committee is required to report its  
5 share received as a transfer-in from the fundraising representative and also file a memo  
6 entry on Schedule A itemizing its share of gross receipts as contributions from original  
7 contributors as required by 11 C.F.R. § 104.3(a). *See* 11 C.F.R. § 102.17(c)(8)(i)(B). For  
8 contribution reporting and limitation purposes, the date a contribution is received by the  
9 joint fundraising representative is the date that the contribution is received by the  
10 participating political committee, even though the participating political committee is  
11 only required to report the proceeds once the funds have been transferred from the  
12 fundraising representative. *See* 11 C.F.R. § 102.17(c)(3)(iii), (c)(8).

13 During the 2008 election cycle, McCain 2008 received \$22,257,684.17 in  
14 transfers from six joint fundraising committees: McCain Victory Committee, McCain  
15 Victory 2008, McCain Victory California, McCain Victory Florida, McCain Victory  
16 Kentucky, and McCain Victory Ohio. *See* Audit Memorandum (Sept. 27, 2012) at 1.  
17 These contributions were transferred on various dates between April 30, 2008 and  
18 January 7, 2009. McCain 2008 correctly reported the dates it received transfers from its  
19 joint fundraising representatives; however, the Committee did not correctly report the  
20 original dates on which the transferred funds were originally received by the joint  
21 fundraising representative, as required by 2 U.S.C. § 434(b)(2), (4); 11 C.F.R. §§  
22 104.3(a)-(b), 102.17(c). *Id.* at 2. McCain 2008's use of the deposit date instead of the  
23 original receipt date resulted in the appearance in its disclosure reports that it had

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1 accepted millions of dollars of excessive contributions after the date of the candidate's  
2 nomination.

3 The Commission initially brought this problem to the attention of McCain 2008 in  
4 Requests for Additional Information ("RFAIs"), which questioned a number of primary  
5 contributions that were identified as possibly excessive because the Committee received  
6 the transfer of funds after the date of the candidate's nomination. See RFAI (May 28,  
7 2009), RFAI (May 28, 2009), RFAI (June 2, 2009), and RFAI (July 7, 2009). These  
8 RFAs sought clarification as to whether the contributions were incompletely or  
9 incorrectly reported. The Commission also noted in the F&LA that certain excessive  
10 contributions may have been misreported as being received after the date of the primary.  
11 F&LA at 4, n.2.

12 McCain 2008 disputes that it misreported joint fundraising receipts. The  
13 Committee states that its use of the date of deposit as the date of receipt for these  
14 contributions on disclosure reports was both appropriate and consistent with Commission  
15 regulations. See Resp. to Notif. at 2; Supp. Resp. at 2 (Apr. 14, 2011). McCain 2008  
16 claims that using the deposit date is an established convention among large campaigns  
17 seeking to mitigate the logistical hurdles of reporting the actual dates of receipt for  
18 thousands of individual contributions. See Resp. to Notif. at 2. The Committee points to  
19 the Commission's Financial Control and Compliance Manual for Presidential Primary  
20 Candidates Receiving Public Financing ("Compliance Manual"), which instructs  
21 presidential campaigns to maintain records showing the date of receipt for each  
22 contribution and states that, "[u]nless there is evidence that contributions are not  
23 deposited promptly upon receipt, the date of deposit will normally be considered to be the

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1 date of receipt." *See* Resp. to Notif. at 2; Supp. Resp. at 2, *citing* Compliance Manual at  
2 46, <http://www.fec.gov/pdf/Compliance2000.pdf>.

3 McCain 2008's reporting methodology for joint fundraising receipts is contrary to  
4 Commission regulations, Commission precedent, and the Compliance Manual cited by  
5 the Committee. The applicable regulation and the parallel Explanation & Justification  
6 clearly state that although distribution of joint fundraising proceeds may be delayed until  
7 expenses are paid, for reporting and limitation purposes, the date of receipt of such  
8 contributions by a participating political committee is the date that the contribution is  
9 received by the fundraising representative. 11 C.F.R. § 102.17(c)(3)(iii); *see* Transfer of  
10 Funds; Collecting Agents, Joint Fundraising Committees, 48 Fed. Reg. 26296, 26299  
11 (June 7, 1983).

12 The Commission's recent finding in Obama for America is instructive. There, the  
13 Commission found reason to believe that Obama for America violated 2 U.S.C. § 434(b)  
14 when it failed to correctly report the original receipt dates for joint fundraising  
15 contributions totaling \$85,158,116 as the date those contributions were originally  
16 received by the joint fundraising representative.<sup>3</sup> *See* Commission Certification, at ¶ 2.a.  
17 MUR 6078 (Obama for America, *et al.*) (Mar. 22, 2012).

18 Contrary to the contention of the Committee, moreover, the Compliance Manual  
19 section cited by McCain 2008 does not apply to joint fundraising contributions. First, the  
20 transfer from the joint fundraising representative provides "evidence that contributions

<sup>3</sup> McCain 2008 asserts that the Commission did not object to the 2000 and 2004 Bush-Cheney campaigns or GELAC's use of the "date of receipt of transfer" method to report joint fundraising contributions. *See* Resp. to Notif. at 3. In fact, the question of correct joint fundraising reporting was not an issue in those audits and had not been squarely before the Commission until MUR 6078 (Obama for America).

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1 are not deposited promptly" upon their initial receipt. Thus, even by its own terms, this  
2 section does not apply. Second, the Compliance Manual contains explicit instruction for  
3 reporting joint fundraising contributions. According to the Compliance Manual, publicly  
4 funded presidential primary committees should follow the procedures at 11 C.F.R.  
5 § 9034.8(c) requiring the itemization of joint fundraising receipts as contributions from  
6 original contributors to the extent required under section 104.3. See Compliance Manual  
7 at 18. The Compliance Manual further emphasizes that a "major" element in the  
8 regulations is that such contributions are considered received by the participating  
9 committee on the date of receipt by the joint fundraising representative. *Id.* at 19.

10 The Committee's arguments do not alter the fact that McCain 2008 did not report  
11 the dates on which its joint fundraising representatives originally received contributions  
12 totaling \$22,257,684.17 as Commission regulations require. Accordingly, we  
13 recommend that the Commission find reason to believe that McCain 2008 violated  
14 2 U.S.C. § 434(b).

15 **2. Misreporting of Transfers to GELAC**

16 A committee that receives an excessive contribution may remedy the excessive  
17 amount by refunding the excessive amount or by seeking a redesignation or reattribution  
18 within 60 days. 11 C.F.R. § 110.1(b)(5). If a contribution is redesignated by a  
19 contributor in accordance with section 110.1(b)(5), the treasurer of the authorized  
20 political committee receiving the contribution is required to report the redesignation in a  
21 memo entry on Schedule A of the report covering the reporting period in which the  
22 redesignation is received. 11 C.F.R. § 104.8(d)(2)(i). The first part of the memo entry  
23 must disclose all the information for the contribution as it was originally reported on

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1 Schedule A. *Id.* The second part of the memo entry must disclose information on the  
2 contribution as it was redesignated by the contributor, including the date the  
3 redesignation was received and the election for which the contribution was redesignated.  
4 *Id.*

5 According to the Audit Division, the Committee redesignated a total of  
6 \$13,782,264 in primary contributions to GELAC. The Audit Division performed a  
7 sample review of these redesignated contributions to test the timeliness of the  
8 redesignations and compliance with itemization and disclosure requirements. *See*  
9 Attach. 1 at 2, n.4. A projection of primary redesignations to GELAC indicated that  
10 \$1,989,693 or 14.4 % of these redesignations were not itemized in memo entries on  
11 McCain 2008's disclosure reports.<sup>4</sup> *See Id.* at 2.

12 McCain 2008 stated that the Committee's "regular and intended practice" was to  
13 include memo entries with all contributions it redesignated to GELAC. *See Supp. Resp.*  
14 at 1. In an attachment, the Committee included a page from its 2008 April Monthly  
15 report showing the itemization of a single redesignated contribution. *Id.* at Attach. A. In  
16 its response to the audit, McCain 2008 stated that the failure to include memo entries for  
17 those redesignations was inadvertent and will be corrected through the amendments to the  
18 relevant disclosure reports. *See Resp. to Notif.* at 3.

19 But the fact remains that McCain 2008 failed to itemize in memo entries  
20 \$1,989,693, or 14.4 % of these redesignations, on its disclosure reports. Accordingly, we

<sup>4</sup> The sample error amount was projected using a Monetary Unit Sample with a 95 % confidence level. *See Attach. 1 at 3 n.5.* According to the Audit Division, the sample estimate could be as low as \$1,408,345 (9.51%) or as high as \$2,571,041 (19.37%). *Id.*

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1 recommend that the Commission find reason to believe that McCain 2008 violated  
2 2 U.S.C. § 434(b).

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3 **V. RECOMMENDATIONS**

- 4 1. Find reason to believe that John McCain 2008, Inc. and Joseph Schmuckler in his  
5 official capacity as treasurer violated 2 U.S.C. § 434(b);  
6  
7 2. Authorize conciliation with John McCain 2008, Inc. and Joseph Schmuckler in  
8 his official capacity as treasurer prior to a finding of probable cause to believe;  
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10 3. ---  
11  
12 4. Approve the attached Factual and Legal Analysis; and

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5. Approve the appropriate letter.

Anthony Herman  
General Counsel

Daniel A. Petalas  
Associate General Counsel  
for Enforcement

October 31, 2012  
Date

BY:

Kathleen M. Guith b. PS  
Kathleen M. Guith  
Deputy Associate General Counsel  
for Enforcement

Peter G. Blumberg  
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Attachments:

1. Audit Memorandum to Anthony Herman (Apr. 18, 2012)

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